85 - 2042
No.

Supreme Court, U.S.
FILED
JUN 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

CARL CARBONE,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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33 pp

QUESTION PRESENTED FOR REVIEW

Whether the New York State statute under which Petitioner was convicted and sentenced to a period of incarceration of six years to life was violative of Petitioner's constitutional right not to be subjected to cruel and unusual punishment, under the Eighth Amendment to the United States Constitution.

LIST OF INTERESTED PARTIES

Counsel of record for CARL CARBONE certifies that the following parties have an interest in the outcome of this case.

1. People of the State of New York, respresented by John J. Santucci, District Attorney, Queens County, 125-01 Queens Boulevard, Kew Gardens, New York 11415.

2. Solicitor General
   Department of Justice
   Washington D.C. 20530

3. Attorney General
   State of New York
   State Campus
   Albany, N.Y. 12207

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

CARL CARBONE,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Carl Carbone, prays for a **writ of certiorari** to review an order of the Court of Appeals of the State of New York, entered in these proceedings on March 25, 1986, which denied Petitioner's motion for a certificate granting an appeal to said Court of Appeals, from an order of the Supreme Court of the State of New York,

Appellate Division, Second Judicial Department, entered in these proceedings February 3, 1986, which affirmed a judgment of the Supreme Court of the State of New York, Queens County, which, on July 20, 1984, convicted him of the crime of Criminal Sale of a Controlled Substance in the Second Degree (New York State Penal Law §220.41) upon his plea of guilty.

OPINION BELOW

The order of the Hon. VITO J. TITONE, Associate Justice of the Court of Appeals of the State of New York, denying Petitioner's application for a certificate permitting his appeal from the affirmance of his conviction by the Supreme Court of the State of New York, Second Judicial Department, appears at page 1a to page 2a

of the attached Appendix. The decision has been officially reported at 67 N.Y.2d 606 (1986).

The opinion of the Supreme Court of the State of New York, Second Judicial Department, affirming Petitioner's conviction in the Supreme Court of the State of New York, Queens County, appears at page 3a to page 6a of the attached Appendix. The decision has not as yet been officially reported.

JURISDICTION

The final order of the Court of Appeals of the State of New York in this matter was entered on March 25, 1986.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). This Court has jurisdiction of the controversy

because it involves a "...title, right privilege or immunity...specially set up or claimed under the Constitution, treaties, statutes of, or commission held or authority exercised under the United States." 28 U.S.C. §1257(3).

STATUTORY PROVISION INVOLVED

Section 220.41 of the Penal Law of the State of New York provides:

"A person is guilty of criminal sale of a controlled substance in the second degree when he knowingly and unlawfully sells:

1. one or more preparations, compounds, mixtures or substances of an aggregate weight of one-half ounce or more containing a narcotic drug; or

2. one of more preparations, compounds, mixtures or substances of an aggregate weight of one-half ounce or more containing methamphetamine, its salts, isomers or salts of isomers; or

3. five grams or more of a stimulant; or

4. five milligrams or more of lysergic acid diethylamide; or

5. one hundred twenty-five milligrams or more of a hallucinogen; or

6. five grams or more of a hallucinogenic substance; or

7. three hundred and sixty milligrams or more of methadone.

Criminal sale of a controlled substance in the second degree is a Class A-II felony."

STATEMENT OF THE CASE

The Grand Jury of Queens County indicted Petitioner for two counts of Criminal Sale of a Controlled Substance in the First Degree (Penal Law §220.43), based upon two alleged sales of cocaine, which were said to have occurred on October 27, 1983 and November 14, 1983.

On October 27, 1983, Petitioner is alleged to have sole to a New York City Police Department Narcotics Division undercover officer approximately four ounces of cocaine in exchange for $7,500.00. The location of the alleged transaction, according to police, was a parking lot near the Whitestone Expressway and Linden Place in Queens.

On November 14, 1983, Petitioner is alleged to have sold to the same Narcotics

Division undercover officer approximately eight ounces of cocaine in exchange for $13,000.00 at the same location in Queens. On this occasion, members of the Narcotics Division placed Petitioner under arrest.

After being duly arraigned, plea negotiations between counsel for Petitioner and the District Attorney's office ensued. The District Attorney's office insisted that the only appropriate disposition short of trial was a plea of guilty to Criminal Sale of a Controlled Substance in the Second Degree with the imposition of a six year minimum period of incarceration. Try though he might, counsel for Petitioner was unable to convince the District Attorney's office to reduce the minimum incarceration.

Ultimately, recognizing that the likelihood of acquittal after trial was extremely small, Petitioner entered a plea

of guilty to the Class A-II felony, with the promised proposed sentence, on June 29, 1984. The matter was adjourned for sentencing and a probation report was duly prepared by the Department of Probation.

On July 20, 1984, Petitioner was sentenced. At the proceedings, counsel for Petitioner requested the Court intercede in the proceedings and reduce the minimum period of incarceration to be imposed upon Petitioner from six years to three years. Counsel for Petitioner pointed to the fact Petitioner received extensive support from his family, that he was newly married and that his wife was expecting a child.

Counsel also acknowleged that the matter was before the Court under a negotiated plea of guilty, but that counsel believed that the Court ought reconsider the negotiated plea and be as lenient as

possible in pronouncing sentence upon Petitioner. Counsel pointed out that as far as the law was concerned, there was little difference between a six year or a three year incarceration but that to Petitioner the imposition of a full six year minimum term as opposed to a reduced three year period would be of significant impact in destroying prospects for his eventual rehabilitation.

Petitioner, at sentence, told the Court that he was sorry for what he had done and "was willing to pay [his] price." However, Petitioner thought that the six year period of incarceration was unduly harsh and joined his counsel in requesting the Court to intercede on Petitioner's behalf.

The Court below, stated that it was adhering to the recommendation of the

District Attorney's office, in spite of the requests by Petitioner and his counsel. The Petitioner was then sentenced by the Court to six years to life.

Petitioner appealed the decision to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department. After the filing of briefs and hearing of oral argument, the Appellate Division unanimously affirmed the lower Court. (See Appendix B.)

A motion for leave to appeal to the Court of Appeals of the State of New York was duly made by Petitioner. The Court of Appeals denied the Motion on March 25, 1986. (See Appendix A.)

The instant petition for a writ of certiorari ensued.

REASONS FOR GRANTING WRIT OF CERTIORARI

THE NEW YORK STATE STATUTE UNDER WHICH PETITIONER WAS CONVICTED AND SENTENCED TO A PERIOD OF INCARCERATION OF SIX YEARS TO LIFE WAS VIOLATIVE OF PETITIONER'S CONSTITUTIONAL RIGHT NOT TO BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT, UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner entered the plea of guilty to Criminal Sale of a Controlled Substance in the Second Degree to one count in the indictment in satisfaction of the entire indictment, because he was factually guilty of the offenses described there. Petitioner admitted his guilt with candor.

Petitioner also stood prepared to accept and serve the sentence ultimately imposed upon him.

However, it is submitted that, under the circumstances present, the interest of justice would not be served by such a harsh sentence, with its extensive minimum period of incarceration. Petitioner acted perhaps out of immaturity or a lack of judgment. However, certain factors such as the fact that he admitted his guilt, his general background of strong family support, his disability, and indications that he was not a major dealer of narcotics, give support to his contention on appeal that, as to him, a sentence of incarceration is inappropriate to the point of being unconstitutional.

The probation report indicated that Petitioner came from a strong and loving

family background. It would appear that Petitioner fell into bad company, which unduly negatively influenced him.

Certainly, the amputation of his left index finger in an industrial accident with its resultant severe disabling features was yet another factor which had a negative influence upon Petitioner. The monetary settlement, although quite large, can never really make up the loss of the finger.

As the Courts of the State of New York have declined to grant Petitioner the relief he requested, Petitioner turns to this Court and asks that his present application be granted, as he submits that the imposition of the lengthy sentence of incarceration constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

Recognizing that various parts of the State of New York faced, and still continue to face, a very serious law enforcement problem in the area of narcotics control, in September, 1973, the Legislature of the State passed a series of drug laws which were, at the time of passage, the most severe laws of this type in the United States. Although the laws were somewhat modified in 1979, it would be fair to state that the New York drug laws are the most severe such statutes in the nation.

Their constitutionality with respect to the Eighth Amendment were upheld in People v. Brodie, 37 N.Y.2d 100 (1975). It should be noted that the appellant in Broadie sought further review in this Court but his petition for certiorari was denied. Broadie v. New York, 423 U.S. 950 (1975).

Generally, in its decision in Broadie, the New York State Court of Appeals held that sentences under the narcotics section, Article 220 of the Penal Law of the State of New York, were not grossly disporportionate under constitutional analysis, because the Legislature of the State had the power to distinguish among the ills of society which require criminal sanction and prescribe appropriate punishment. The State Legislature had the power to make a finding that unlawful sales of narcotics were symptoms of a widespread and dangerous phenomenom. The Legislature was entitled to classify sales of certain narcotics as being equivalent to the most violent of crimes.

In the case, the Court of Appeals analyzed the circumstances of each of eight defendants, before the Court, who had been

sentenced under Article 220. It was found that in each case, the defendants had been previously convicted of at least street sales of heroin or cocaine or had been found in possession of large amounts of narcotics.

However, in dicta, the Court stated that in certain rare cases upon particular facts, imposition an A felony type of sentence under the statute might constitute an unconstitutional sentence.

Here, it is submitted that an analysis of the factual background leads to the conclusion that the imposition of a sentence of incarceration for from six years to life is harsh and excessive to the point of being unconstitutional as applied to Petitioner. It is, in short, a candidate for the rare case referred to in Broadie.

Petitioner suggests that the sentence imposed upon him constituted an Eighth Amendment violation of his rights. See Hutto v. Finney, 437 U.S. 678 (1978); Estelle v. Gamble, 429 U.S. 97 (1978); Weems v. United States, 217 U.S. 349 (1910).

CONCLUSION

For the reasons stated above, it is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

JOHN J. MAGUIRE
Counsel for Petitioner
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CERTIFICATE

John J. Maguire hereby certifies that he is a member of the bar of the Supreme Court of the United States and states that three copies of the Petition for a Write of Certiorari to the Court of Appeals of the State of New York were mailed by postpaid First Class Mail to the following:

1. John J. Santucci, Esq.
   District Attorney, Queens County
   125-01 Queens Boulevard
   Kew Gardens, N.Y. 11415
2. Solicitor General
   Department of Justice
   Washington, D.C. 20530
3. Attorney General
   State of New York
   State Campus
   Albany, N.Y. 12207

by depositing same in a United States Post Office with first class postage prepaid and that forty copies were deposited in a United States Post Office with first class postage prepaid and properly addressed to The Clerk of the Supreme Court of the United States, Supreme Court Building, One First Street, N.E. Washington, D.C. 20543.

JOHN J. MAGUIRE

Sworn to before me
this 11th day of
June, 1986

Roland W. Johnson
Notary Public, State of New York
No. 4502705
Qualified in Delaware County
Commission Expires March 30, 1987

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. VITO J. TITONE Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

against

CAR CARBONE,

Appellant.

I, VITO J. TITONE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
March 25, 1986

/s/
Associate Judge

Appendix A

*Description of Order:

Order of the Appellate Division, Second Department dated February 3, 1986, affirming a judgment of Supreme Court, Queens County, rendered July 20, 1984.

APPENDIX B

Order of the Supreme Court, Appellate Division, Second Judicial Department

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 3, 1986.

HON. LEON D. LAZER, Justice Presiding,
HON. GUY J. MANGANO,)
HON. RICHARD A. BROWN,) Associate Justices
HON. SYBIL HART KOOPER)

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

CARL CARBONE,

Appellant.

In the above entitled action, the above named Carl Carbone, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Queens County, rendered July 20, 1984, convicting him of criminal sale of a controlled substance in the second degree, upon his plea of guilty, and sentencing him to an indeterminate term of six years to life

Appendix B

imprisonment; and the said appeal having been argued by Raymond E. Kerno, Esq., of counsel for the appellant and submitted by Alexander P. Schlinger, Esq., of counsel for the respondent, and due deliberation having been had thereof; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

E N T E R :

IRVING N. SELKIN

Clerk of the Appellate Division

Appendix B

2768j
Z/jc

LEON D. LAZER, J.P.
GUY J. MANGANO
RICHARD A. BROWN
SYBIL HART KOOPER, JJ.

___AD2d___ A- December 16, 1985

3076 E The People, etc., respondent, v. Carl Carbone, appellant. (Ind. No. 4121/83)

Richard Hartman, Little Neck, N.Y. (Raymond E. Kerno of counsel), for appellant.

John J. Santucci, District Attorney, Kew Gardens, N.Y. (Alexander P. Schlinger of counsel), for respondent.

Appeal by defendant from a judgment of the Supreme Court, Queens County (Naro, J.), rendered July 20, 1984, convicting him of criminal sale of a controlled substance in the second degree, upon his plea of guilty, and sentencing him to an indeterminate term of six years to life imprisonment.

Judgment affirmed.

The sentence imposed upon defendant was within the statutory limits and those limits were not unconstitutionally excessive as applied to this defendant (see, People v. Broadie, 37 NY2d 100, cert denied 423 US 950).

Appendix B

Defendant knowingly, freely and voluntarily pleaded guilty to the charged offense and has no basis now to complain that the sentence was excessive. Defendant received precisely the sentence he bargained for (see, People v. Kazepis, 101 A.2d 816).

LAZER, J.P., MANGANO, BROWN and KOOPER, JJ. concur.

February 3, 1986 PEOPLE V. CARBONE, CARL

3076 E

No. 85-2042

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

October Term, 1985

CARL CARBONE,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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ALEXANDER P. SCHLINGER
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10-P

Question Presented

1. Was the sentence imposed upon petitioner not so grossly disproportionate to his offense as to violate the Eighth Amendment prohibition against cruel and unusual punishment?

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No.

IN THE

Supreme Court of the United States

October Term, 1985

CARL CARBONE,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Statement of the Case

This brief is in opposition to petitioner's application for a writ of *certiorari* to review the order of the New York State Court of Appeals, entered March 25, 1986, denying without opinion the petitioner's application for leave to appeal from an order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated February 3, 1986, which unanimously affirmed the petitioner's judgment of conviction. *People* v. *Carbone*, —— AD2d ——, 498 N.Y.S. 2d 74 (2d Dept. 1986),

lv. den. 67 N.Y.2d 881 (1986). Petitioner was convicted in a judgment of the Supreme Court of the State of New York, Criminal Term, Queens County, rendered July 20, 1984, of criminal sale of a controlled substance in the second degree, N.Y. Penal Law §220.41, and sentenced to an indeterminate term of incarceration of six years to life imprisonment.

Statement of Facts

Petitioner was charged in an indictment with two counts of criminal sale of a controlled substance in the first degree. The charges arose out of two separate transactions, occurring on October 27, 1983 and November 14, 1983, respectively, in which petitioner was alleged to have sold two or more ounces of cocaine to an undercover police officer. Petitioner was arrested following the second transaction.

On June 29, 1984, petitioner Carbone, represented by counsel, interposed a plea of guilty to one count of a reduced charge of criminal sale of a controlled substance in the second degree in full satisfaction of the indictment.

On July 20, 1984, Justice Vincent Naro of the Supreme Court of the State of New York, before whom petitioner had entered his guilty plea, imposed upon petitioner a sentence of six years to life imprisonment.

Following affirmance of petitioner's judgment of conviction by the Appellate Division and denial of leave to appeal to the New York State Court of Appeals, the instant petition for writ of *certiorari* ensued.

POINT ONE

The petition for a writ of *certiorari* should be denied.

Petitioner frankly concedes his guilt both of the original charges against him, two counts of criminal sale of a controlled substance in the first degree (defined in pertinent part in N.Y. Penal Law §220.43 as the sale of two or more ounces containing a narcotic drug),[1] and the single lesser charge to which he was allowed to plead guilty in full satisfaction of all charges, criminal sale of a controlled substance in the second degree (defined in pertinent part in N.Y. Penal Law §220.41 as the sale of one-half ounce or more containing a narcotic drug).[2] Petitioner does not challenge or seek to overturn his conviction itself on his guilty plea. Rather, petitioner urges that the sentence of incarceration imposed upon him of six years to life imprisonment pursuant to the plea arrangement, concededly agreed to by petitioner, petitioner's counsel, the prosecutor and the court, is itself violative of the prohibition in the Eighth Amendment to the United States Constitution against cruel and unusual punishment. Petitioner's argument is wholly without merit and his petition for a writ of *certiorari* should therefore be denied.

The Supreme Court of the United States has previously rejected the argument being made by this petitioner. *Cer-*

1. Criminal sale of a controlled substance in the first degree is punishable by a maximum sentence of twenty five years to life imprisonment. N.Y. Penal Law §70.00.

2. Criminal sale of a controlled substance in the second degree is punishable by a maximum sentence of eight years four months to life imprisonment. N.Y. Penal Law §70.00.

tiorari was denied in *People* v. *Broadie*, 37 N.Y.2d 100, 332 N.E. 2d 338, *cert. den.* 423 U.S. 950 (1975) wherein it was specifically held that a sentence of six years to life imprisonment, precisely the sentence of the petitioner in the instant case, for the "street sale" of cocaine, precisely the offense committed by the petitioner in the instant case, does *not* violate the Eighth Amendment prohibition against cruel and unusual punishment. Similarly, *certiorari* was also denied by this Court in *Carmona v. Ward*, 576 F.2d 405 (2d Cir. 1978), *cert. den.* 439 U.S. 1091 (1979), wherein a sentence of six years to life imprisonment for a class A drug felony, the same level crime as that of which the instant petitioner stands convicted, was held *not* to constitute cruel and unusual punishment within the meaning of the Eighth Amendment. See also, *Peters* v. *Quick*, 567 F. Supp. 331 (USDC, SDNY, 1983), *aff'd* 732 F.2d 142 (2d Cir. 1984) (sentence of six years to life imprisonment for sale of cocaine held not so grossly disproportionate to the offense as to violate Eighth Amendment despite defendant's personal background as a hard-working businessman and family man with no prior criminal record).

In *Hutto* v. *Davis*, 454 U.S. 370 (1982), the Supreme Court reaffirmed the doctrine enunciated in *Rummel* v. *Estelle*, 445 U.S. 263, 274 (1980) that ". . . for crimes concededly classified and classifiable as felonies . . . the length of the sentence actually imposed is purely a matter of legislative prerogative." Thus, ". . . successful challenges to the proportionality of particular sentences should be 'exceedingly rare.' " *Hutto*, 454 U.S. at 374. In accord is *Weems* v. *United States*, 217 U.S. 349 (1910). That the instant petition does not present such an "exceedingly

rare'' case is readily apparent from a review of the facts in *Rummel* and *Hutto*. In *Rummel*, the defendant was sentenced to life imprisonment under a Texas recidivist statute for his third felony for theft of property where the aggregate value of the property stolen in all three crimes totalled approximately $230. The Supreme Court held that Rummel's sentence was not so grossly disproportionate to the offenses committed as to violate the Eighth Amendment prohibition against cruel and unusual punishment. In *Hutto*, the defendant's sentence of forty years imprisonment for possession of nine ounces of marijuana was held not to offend the Eighth Amendment. This petitioner's case, involving the evil, destructive and epidemic plague of narcotic drug sales, with all its attendant violence and ruinous effect on addicts, their families and the victims they so often prey upon to acquire the funds necessary to "support their habit," involves a far more serious type of crime than either *Rummel* or *Hutto* but yet resulted in a lesser sentence. Thus, by no fair or rational standard can the six year to life sentence imposed upon the petitioner in the instant case, notwithstanding his alleged good family background and loss of a finger in an industrial accident, be deemed so grossly disproportionate to his crime as to arguably constitute cruel and unusual punishment within the meaning of the Eighth Amendment.

Accordingly, the instant petition is patently without merit.

Conclusion

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

JOHN J. SANTUCCI
District Attorney
Queens County
Attorney for Respondent

ALEXANDER P. SCHLINGER
Assistant District Attorney
Of Counsel

June, 1986